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No. 85-1451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ERVIN HOWARD, d/b/a LAFAYETTE COMPONENTS,
Petitioner,

v.

CONTINENTAL CASUALTY COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COMPLIANCE WITH RULE 28.1

Pursuant to United States Supreme Court Rule 28.1, Continental Casualty Company states that it is a wholly owned subsidiary of CNA Financial Corporation, which, in turn, is a subsidiary of Loews Corporation.

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None of the "considerations governing review on certiorari" set forth in Rule 17 of the rules of this Court are here present. No federal question is involved; there

are no conflicting decisions in the Court of Appeals; there is no conflict with any applicable decisions of this Court; and the judgment of the Court of Appeals does not conflict with Indiana law.

On the contrary, Petitioner herein simply is dissatisfied with the amount of damages awarded by a jury—which award was fully supported by the evidence and jury instructions. Indeed, the Petitioner is relegated to misstating the facts of the case in an effort to create an issue at all.

A fair recitation of the facts adduced at trial is contained in the Opinion of the Court of Appeals and is adopted herein by this Respondent. (See Petitioner's Appendix for text of the Opinion).

The testimony at trial overwhelmingly established Petitioner's responsibility for the arson fire at his premises and thus supported the policy defense of fraud and false swearing asserted by Respondent. As noted at pages 882-83 of the Court of Appeal's Opinion:

> "[A]s was more fully discussed in the preceding section, a finding that Howard was the arsonist is supported by the record. Howard had a financial incentive to burn the factory; the fire was set just before he left for Louisville; the work stations, wood and tires were moved into a pile sometime between 11:00 p.m. and midnight, and Howard, whose trailer was located only sixty to ninety feet from the factory would have become suspicious upon hearing the noise of the forklift moving the stations, wood and tires had the arson been committed by another person. We conclude that a jury following the court's jury instructions would properly have found that Howard was the arsonist and would deny him recovery on the factory policy because of their being convinced that the affirmative defense of fraud and false swearing precluded his recovery of the factory policy proceeds." (775 F.2d at 882-83; Petitioner's Appendix at p. 29).

The District Court, in denying Howard's post-trial motions, and the Court of Appeals, in affirming the jury verdict, additionally found the jury's award of $9,500 on the auto policy to be readily explainable under the jury instructions. Court Instruction No. 15 defined the claim, counterclaims and affirmative defenses. With regard to the *factory policy*, the instruction specifically set forth that fraud and false swearing was a defense to recovery under the policy.

Just one week prior to trial, and after the Court's Instructions already had been prepared, however, Howard filed an additional Count seeking recovery under an *auto policy* in the amount of $9,500 for a truck burned in the fire. Although Howard's additional claim was added to Instruction No. 15, it was not followed by another paragraph indicating that the defense of fraud and false swearing was available to defeat recovery under the auto policy. (A copy of Instruction No. 15 is included in the Appendix herein). The jury was thus instructed to consider the affirmative defense of fraud and false swearing only as to the building policy.

At Howard's insistence, the jury, additionally, was given only two verdict forms. The first form represented a finding against Howard on both policies. The second form was a general verdict form. Although it purported to find against Continental on its declaratory action, it was the only form which provided a blank for the award of money damages on Howard's counterclaim.

Using a blackboard during closing argument, Howard argued the issue of damages extensively. In instructing the jury on how to fill in the general verdict form, counsel urged:

> "He [Howard] should have a verdict with $379,000."

The jury, however, in returning a verdict in the amount of $9,500 under the auto policy alone clearly indicated that Howard's acts of arson precluded recovery under the build-

ing policy. Where, as here, a jury's verdict can be explained, it must be affirmed. *Mid-West Underground Storage, v. Porter,* 717 F.2d 493 (10th Cir. 1983); *Lopez v. Oldendorf,* 545 F.2d 836, 839 (2d Cir. 1976).

CONCLUSION

Both the District Court and the Court of Appeals properly held that Petitioner's motion for j.n.o.v. was factually and legally without merit. Petitioner has raised nothing in his petition sufficient to warrant reversal or which meets any of the "considerations for review on certiorari." For all of the foregoing reasons and upon the authorities cited, Respondent, Continental Casualty Company, respectfully submits that the Petition for *Writ of Certiorari* should be denied.

Respectfully submitted,

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APPENDIX

Court's Instruction No. 15

In this case plaintiff CONTINENTAL CASUALTY COMPANY alleges that before January 5, 1981 it issued its policy of insurance to ERVIN HOWARD for Mr. Howard's property located at 3463 East Union Street in Lafayette, Indiana. Plaintiff further alleges that Defendant had a fire on January 5, 1981.

Plaintiff states that the policy of insurance provides as follows:

> "G. CONCEALMENT-FRAUD: This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or the interest of the insured therein, or in the case of any fraud or false swearing by the insured relating thereto.
>
> * * *
>
> "L. WHAT TO DO WHEN LOSS OCCURS:
>
> 1. The insured shall as soon as practicable report to his company or its agent every loss or damage which may become a claim hereunder and also report such loss or damage to the police if such is a result of a violation of the law and shall also file with the company or its agent within 90 days from the date of loss a detailed sworn proof of loss. Failure by the insured to report the loss or damage and to file such sworn proof of loss as required shall invalidate any claim hereunder for such loss;
>
> * * *

> 3. The insured and every claimant hereunder shall submit to examination by the company, subscribe to the same, under oath, if required, and produce for the company's examination all pertinent records, all at such reasonable times and places as the company shall designate and shall cooperate with the company in all matters pertaining to loss or claims with respect thereto;"

Plaintiff further states that on February 5, 1981 Defendant submitted a sworn statement in proof of loss relative to Mr. Howard's claim under the policy. In that document ERVIN HOWARD stated under oath that:

> "A fire loss occurred about the hour of 3:15 o clock a.m. on the 5th day of January, 1981. The cause and origin of said loss were: undertermined, possibly arson.
>
> * * *
>
> "The said loss did not originate by any act, design or procurement on the part of the insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed and no attempt to deceive the said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof."

Plaintiff also alleges that on March 19, 1981 ERVIN HOWARD did submit to an examination under oath concerning the claim. Plaintiff alleges that at the examination ERVIN HOWARD was questioned regarding the cause and origin of the fire and that he told Plaintiff that he did not set the fire and that he did not act in collusion with anyone else to cause the fire. Finally, Plaintiff

alleges that by submitting the sworn statement in proof of loss and by testifying as Mr. Howard did at the examination under oath, Mr. Howard has violated the foregoing policy provisions. As a result Plaintiff seeks a declaration by this Court that it has no liability to Defendant under its policy of insurance for the fire loss of January 5, 1981.

Defendant ERVIN HOWARD admits that Plaintiff's policy was issued prior to January 5, 1981; that he sustained a loss by fire on that date; that he submitted a sworn statement in proof of loss on February 5, 1981 and that he submitted to examination under oath on March 19, 1981. ERVIN HOWARD denies that his actions in submitting a sworn statement in proof of loss and in submitting to an examination under oath in which he swore that he did not cause the fire, either alone or in collusion with others, violate any policy provisions.

Defendant has also filed a counter-claim against Plaintiff. In Count I of that counter-claim Defendant alleges that he sustained a loss by fire on January 5, 1981 and that he submitted a claim under his insurance policy for the damages sustained as a result of the fire, but that Plaintiff has refused to pay him the policy proceeds which he claims are due.

Plaintiff admits that the fire occurred and that Mr. Howard submitted a claim. Plaintiff also admits that it has refused to pay Mr. Howard the policy proceeds, and states that it is not indebted to Defendant in any amount whatsoever.

As an affirmative defense to the counter-claim, plaintiff asserts that Defendant violated the policy terms by submitting to an examination under oath and by submitting a sworn statement in proof of loss in which Defen-

dant falsely swore that he did not, either alone or in collusion with others, intentionally cause the fire.

In Count III of his counterclaim, Defendant Howard seeks recovery under a separate policy of insurance for a 1977 Ford F750 Tractor destroyed in the fire. Plaintiff Continental admits that it has not paid for the tractor, but denies that any claim was ever made for it or that it owes anything for it.